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No. 03-419

In The Supreme Court of the United States

J.P. MORGAN CHASE & CO., et al.,

Petitioners,

v.

THE RETIREMENT SYSTEMS OF ALABAMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Issues Presented Below and the Decision of the Court of Appeals Below

Respondents respectfully submit that the Petitioners' summary of the issues presented below is incomplete and fails to state correctly the precise decision of the Court of Appeals for the Eleventh Circuit.

The "Question Presented for Review" set out at page *i* of the Petition is:

> Whether the bar imposed by 28 U.S.C. 1334(d) and 1452(b) *on this Court's review* of orders to abstain and remand, or not to abstain, in actions removed from state court on the ground that they fall within federal bankruptcy jurisdiction *violates the Exceptions Clause of Article III of the United States Constitution*. (Emphasis supplied.)

This "Question Presented" was not before or decided by the United States District Court below or by the Court of Appeals.

The Opinion of the United States Court of Appeals for the Eleventh Circuit, filed June 18, 2003, noted that "Defendants contend that *this* court has jurisdiction to review the district court's abstention order and they urge *this* court to hold that the District Court's order constitutes an abuse of discretion." (emphasis supplied.) The court below first concluded "that the statutory bars to appellate review contained in §§ 1334(d) and 1452(b) are constitutional. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 513-14 (1869); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 104 (1870) [sic]." Having so decided, the court below concluded "As a result, *we* lack jurisdiction to consider the Defendants' argument that the district court abused its discretion

when it exercised its discretionary abstention power under § 1334(c)(1) and remanded the action to state court." (emphasis supplied.) Thus, the decision below was carefully limited to a holding that *the Court of Appeals for the Eleventh Circuit* lacked jurisdiction to review the district court's statutory, discretionary abstention order and the remand as a consequence of such statutory abstention.

Respondents stated below (at pp. 5-8 of Respondents' Response to Jurisdictional Questions Raised by the Clerk, filed November 6, 2002 in the U.S. Court of Appeals) that the Petitioners' appeal to the Court of Appeals was barred by 28 U.S.C. §§ 1334(d) and 1452(b). Respondents asserted below that Congress has both the power to create tribunals inferior to the Supreme Court and the power to invest such inferior courts with jurisdiction or withhold jurisdiction from such inferior federal courts "in the exact degrees and character which to Congress may seem proper for the public good," *Palmore v. United States*, 411 U.S. 389, 401 (1973) quoting *Cary v. Curtis*, 44 U.S. 236, 245 (Jan. Term 1845). Respondents thus correctly framed the issue before the Court of Appeals as being "whether Defendants have a right of appeal to [the Court of Appeals] (rather than whether Defendants have a right of appeal to the Supreme Court)." The decision of the Court of Appeals thus addressed in its holding the real question, which was the statutory bar of 28 U.S.C. §§ 1334(d) and 1452(b) (similar to the statutory bar of 28 U.S.C. § 1447(d)) to a review *by the Court of Appeals*.

The Petitioners' statement of the question that is here "presented for review" thus incorrectly assumes either that this Court's original jurisdiction was involved (which it was not) or else that a direct mode of review in this

Court of the District Court's decision was sought and barred (which also has not occurred).

The Court of Appeals' holding only relates to the first half of the bar on appellate review (that is, the bar on appeal to a Court of Appeals) contained in 28 U.S.C. §§ 1334(d) and 1452(b). As such, Petitioners' request for review of the Court of Appeals' holding should not implicate any constitutional issue, as to whether the *second* half of the bar on appeals (that is, the bar on this Court's right of review except in certain instances) is valid. In that regard, the United States as Intervenor correctly stated (at pp. 2, 12-13 and 14-19 of its March 10, 2003 Brief filed in the Court of Appeals below) that the portions of 28 U.S.C. §§ 1334(d) and 1452(b) which bar circuit court review are severable from the provisions of those statutes which bar discretionary Supreme Court review of remand and abstention orders:

> This Court [the Court of Appeals] lacks jurisdiction to decide this appeal. Defendants concede that §§ 1334(d) and 1452(b) foreclose circuit court review of the district court's order. Although they have couched their appeal as a constitutional challenge, this does not give this Court jurisdiction over the present appeal. Defendants' sole constitutional complaint is that Congress exceeded its Exception Clause power by shielding abstention orders from *Supreme Court* review. Defendants do not argue, because they cannot, that Congress lacks power to strip this Court [of Appeals] of jurisdiction. Thus, even accepting as correct Defendants' argument that the Supreme Court must have jurisdiction, the argument does not implicate or alter the fact that §§ 1334(d) and 1452(b) clearly deprive this Court [of Appeals] of jurisdiction over this appeal.

> . . . defendants are mistaken to the extent that they assume (without argument) that the alleged constitutional defect would warrant striking down §§ 1334(d) and 1452(b) in their entirety.
>
> Here, there is no evidence that Congress would not have sought to preclude circuit court review independently of its preclusion of discretionary Supreme Court review of remand and abstention orders. . . . there is no question that the clauses would be severable . . . accordingly, even if it were unconstitutional to bar Supreme Court review of abstention orders, those portions of §§ 1334(d) and 1452(b) would be stricken from the two statutes, leaving the constitutional portions intact.

REASONS FOR DENYING THE PETITION

ARGUMENT

I. NONE OF THE CRITERIA SET OUT IN RULE 10 OF THE RULES OF THIS COURT WHICH MIGHT JUSTIFY REVIEW ON WRIT OF *CERTIORARI* ARE PRESENT IN THIS CASE.

Petitioners have not demonstrated that the decision below is in conflict with either: a relevant decision of this Court; a decision of another United States court of appeals; or a decision of a state court of last resort. The Petition does not demonstrate that the question presented for review (at p. *i* of the Petition) involves lower court conduct that has so far departed from the accepted and usual course of judicial proceedings (or sanctioned such a departure by a lower court), as to call for an exercise of this Court's supervisory powers, or is an important

question which has not been, but should be, settled by this Court.

While citing divergent decisions in different *district* courts on facts-and-circumstances based determinations whether or not to abstain under 28 U.S.C. § 1334(c), the Petition wholly fails to demonstrate that the opinion of the Court of Appeals below is in conflict with relevant decisions of this Court or a decision of another United States Court of Appeals or a decision of a state court of last resort on the same matter. Moreover, the record is devoid of any support for the Petitioners' assertions that the several district court WorldCom cases are "identical" and the circumstances favoring abstention or not are "identical" (Petition p. 6). Here, the District Court's discretionary abstention ruling fits in the mainstream of jurisprudence, especially given the fact that Respondents' case is primarily based on four counts of state law violations and two counts of violations of the Securities Act of 1933 (under which the state courts may exercise concurrent jurisdiction), as recognized by the remand opinion, and the Petition fails to cite another case that involves Respondents' specific situation or state law claims.[1] Not only does the Petition fail to cite any 28 U.S.C. § 1334(c) and (d) statutory abstention decision of this Court, of a Court of Appeals, or of the highest court of a state, which is contrary to the

[1] The District Court's opinion describes Respondents' suit as follows: "RSA's Amended Complaint alleges that the Defendants violated the Alabama Securities Act, *Ala. Code* §§ 8-6-1 *et seq.*, the Alabama common law of aiding and abetting, the Alabama statutory and common law of fraud, including *Ala. Code* §§ 6-5-100 *et seq.*, and Sections 11, 12(a)(2) and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(a)(2), & 77*o*." (Footnotes omitted.)

decision of the District Court and of the Eleventh Circuit below, but the Petition: (1) erroneously applies non-statutory abstention doctrines to this statutory abstention proceeding; and (2) fails to show that the decision of the District Court is a severe "departure from the accepted and usual course of judicial proceedings" so as "to call for an exercise of this Court's supervisory power." The Petition would invite this Court, in the face of strong Congressional policy favoring the nonreviewability of remand orders and statutorily-authorized abstention rulings, to embark on a road of reviewing individualized 28 U.S.C. § 1334(c)(1) discretionary abstentions and 28 U.S.C. § 1452(b) equitable-factors abstentions.

There is, in fact, no split of authority in decisions of the Courts of Appeals on the non-appealability of abstentions in remand situations, and such decisions do not avoid the bar against appellate review by holding the ban unconstitutional. The Courts of Appeals have repeatedly upheld the proposition that a district court's discretionary decision to abstain under 28 U.S.C. § 1334(c)(1) and (d), or to remand pursuant to abstention under 28 U.S.C. § 1452(b), is not reviewable by appeal, without finding such bar to be unconstitutional. *See, e.g., Wallace v. Hastings*, No. 02-5080, 2003 WL 22211612 (10th Cir. Sep. 25, 2003); *In re Cody, Inc.*, 338 F.3d 89 (2d Cir. 2003); *Bartlett v. Arthur Andersen, LLP,* No. 01-17327, 2003 WL 173521 (9th Cir. Jan. 24, 2003); *In re Cathedral of the Incarnation*, 99 F.3d 66, 68-69 (2d Cir. 1996); *In re Magnolia Gas Co., L.L.C*, Nos. 01-6001, 01-6093, 2002 WL 497417 (10th Cir. Apr. 3, 2002); *Christo v. Padgett*, 223 F.3d 1324, 1332 n.8 (11th Cir. 2000), *cert. denied,* 531 U.S. 1191 (2001); *Ariail Drug Co., infra; In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 389 n.14 (3d Cir. 2002); *In re Adams*, 809 F.2d 1187, 1188 (5th Cir. 1987); *Allied Signal*

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Just as the Eleventh Circuit, below, declined to find unconstitutional the statutory bar on appellate review of a remand order, so the Fifth Circuit also ruled, in *Doleac v. Michalson*, 264 F.3d 470 (5th Cir. 2001). The Petition refers us to no contrary decisions.

II. THE CHALLENGED STATUTES (28 U.S.C. §§ 1334(d) AND 1452(b)) DO NOT UNCONSTITUTIONALLY "FORBID ALL ACCESS TO REVIEW BY THIS COURT" AS THE PETITION (AT PP. 14-15 AND 27-29) ARGUES.

The Petition erroneously argues (at pp. 14-15 and 27-29) that the challenged statutes (28 U.S.C. §§ 1334(d) and 1452(b)) unconstitutionally forbid all access to review of this case *by this Court*.

The district court's decision merely determined which court – state or federal – will adjudicate the claims and defenses in the first instance. If Petitioners (Defendants below) are dissatisfied with rulings of or the final judgment entered by the state court, they may appeal through the state court judicial system and may ultimately seek *certiorari* review by this Court, pursuant to 28 U.S.C. § 1257.

Moreover, as Respondents and the United States argued below, 28 U.S.C. §§ 1334(d) and 1452(b) do not preclude a party from seeking mandamus. *See, e.g.,*

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 350 (1976) in which this Court held that mandamus was available, notwithstanding 28 U.S.C. § 1334(d), to review a district court's order granting a motion to remand on "grounds not provided by statute" [the fact that the district court's docket was crowded]; *Dow Corning Corp. v. Dow Chem. Co.*, 113 F.3d 565, 569 (6th Cir. 1997) (construing § 1334(d) to permit mandamus review), *cert. denied,* 522 U.S. 977 (1997); and *Allied Signal*, 298 F.3d at 270-71 (determining that mandamus was available to review a remand order issued by a district court on grounds not authorized by statute in excess of the district court's statutory authority).

Additionally, under the so-called "substantive law exception," remands to state court based upon determinations of substantive rights of the parties may be reviewed by an appellate court, *see, City of Waco v. United States Fidelity & Guar. Co.,* 67 F.2d 785 (5th Cir. 1933), *dismissal of appeal of remand order affirmed and dismissal of appeal of trial court's dismissal of merits claim reversed,* 293 U.S. 140 (1934); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1285 (11th Cir. 1999); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984).

Further, 28 U.S.C. § 1334(d) permits appellate review of "mandatory" abstention orders issued pursuant to 28 U.S.C. § 1334(c)(2).

A strong Congressional policy against "ricocheting" cases and the concomitant strain on judicial resources has repeatedly been recognized, as for example in *In re Loudermilch*, 158 F.3d 1143, at 1145 n.3 (11th Cir. 1998):

In enacting 28 U.S.C. § 1447(d), Congress contemplated that district courts might make erroneous remand decisions. The statute's approach respects the province of both the district courts (because their orders are not reviewable by federal appellate courts) and the state courts (because the statute is intended to prevent a case from repeatedly ricocheting in and out of state court based on the most recent determinations of a federal court). This approach also prevents a waste of state and federal judicial resources.[2]

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[2] *See also*, *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 136 (1995) ("In sum, a 'strong congressional policy against review of remand orders,' *Sykes*, 834 F.2d, at 490, underlies §§ 1447(d) and 1452(b).") (Justices Ginsberg and Stevens, concurring); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 354-55 (1976) (Dissenting opinion of Justice Rehnquist): "[T]he limitation found in § 1447(d) has remained substantially unchanged since its enactment in 1887, and this Court has consistently ruled that the provision prohibits any form of review of remand orders. Congress' purpose in barring review of all remand orders has always been very clear – to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand. The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice."

III. CONGRESS HAS PLENARY POWER TO CONFER JURISDICTION UPON STATE COURTS TO HEAR AND DECIDE, IN THE FIRST INSTANCE, CASES ARISING UNDER THE CONSTITUTION OR UNDER THE LAWS OF THE UNITED STATES; AND NO SUPREMACY CLAUSE ISSUES ARE INVOLVED HERE.

As Professors Wright, Miller and Cooper have observed in 13 Federal Practice and Procedure at p. 11 (2d Edition) (1984):

> It is interesting that Congress proceeded immediately to give the circuit courts jurisdiction in diversity cases, but that no jurisdiction was conferred on the lower federal courts in cases arising under the Constitution or law of the United States. Except for a one-year interlude, it was not until 1875 that there was a general grant of federal question jurisdiction. These cases could be brought only in the state courts.

To the extent that Petitioners are directly and indirectly challenging the bar on appellate review of remand orders as infringing on this Court's powers under the Supremacy Clause,[3] 28 U.S.C. §§ 1334(d) and 1452(b) do not legitimately involve that concern. A federal district court's ruling on statutory abstention under a *federal*

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[3] *See, e.g.*, Petition at p. 12 ("Defined in this manner, exceptions do not compromise this Court's function as guarantor of uniformity of federal law. . ." and "Statutes that completely curtail this Court's power to review particular questions of federal law . . ."), and p. 13 ("The Constitution created this Court so that discord of this nature could be alleviated."), and pages 15-17 generally.

statute does not involve a construction of the *Constitution*, and therefore does not implicate this Court's power to serve as ultimate arbiter of what the *Constitution* (as opposed to what a *statute*) means. Moreover, a *federal* lower court's ruling on *federal statutory* abstention does not implicate any overlap or cross-purposes between *state* and *federal* law, and therefore does not implicate this Court's power, under the Supremacy Clause, to serve as ultimate arbiter of any alleged conflict between *state* and *federal* law and to avoid the threat to uniformity posed by varying state laws or state supreme court decisions. Only a garden variety ruling under a *federal* statute made by a *federal* court is here involved.

IV. CONGRESS HAS PLENARY POWER TO BAR AN APPEAL FROM A REMAND ORDER WHICH MERELY DECIDES WHICH COURT – STATE OR FEDERAL – WILL FIRST HEAR AND DECIDE THE MERITS OF A CASE; AND THERE IS NO VESTED CONSTITUTIONAL RIGHT IN A MODE OF PROCEDURE.

At common law, before the adoption of the constitution, and before Congress enacted statutes creating the inferior federal courts, there was no right to remove a case initially filed in state court to federal court, no right to seek remand to state court, no right to seek an abstention order, and no right to appeal. As this Court long ago recognized in *Gaines v. Fuentes,* 92 U.S. 10, at 18 (1876); and in *Great Northern Ry. Co. v. Alexander,* 246 U.S. 276, 280 (1918), it rests entirely with Congress to decide whether a federal court may assert jurisdiction over a case initially brought in state court, at what time such power may be asserted, and at what stage of the proceedings,

whether before trial or after the state court has entered judgment. Congress, which has enacted statutes creating the inferior federal courts and statutes permitting removal to the federal courts, remand to the state courts, abstention, and appeals, has plenary power with respect to such removals, remands, abstention orders, appeals, and the appellate jurisdiction (if any) of the federal courts, including the right to permit appeals only after final judgment by the highest state court and the right to bar an appeal from an order which merely decides which court – state or federal – will, in the first instance, hear and decide the merits of the claims and defenses asserted in the case.

The right of a party under certain statutorily-defined circumstances to remove a case from state court to an inferior federal court, or to seek remand or to seek an abstention order was unknown to the framers of our constitution. As Professors Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper have observed: "The right to remove a case from a state to a federal court is purely statutory and the terms of its availability are entirely dependent on the will of Congress." 14B Federal Practice § 3721 (3d ed. 1998). The statutory right of removal from a state court to a federal court is not a constitutional right nor a right falling within the original jurisdiction of the Supreme Court. Such a limited statutory right is merely a procedural right which Congress is constitutionally empowered to grant, deny, or carve out of the appellate authority of the Courts of Appeals and of the United States Supreme Court.

As this Court held, in an opinion delivered by Mr. Justice Field, in *Gaines*, 92 U.S. at 18:

> . . . it rests entirely with Congress at what time the power [to seek adjudication by a federal court] may be invoked and upon what conditions; whether originally in the Federal Court, or after suit brought in the State Court; and, in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a Federal Court, or after judgment upon appeal or writ of error.

In *Great Northern Ry.*, 246 U.S. at 280, in an opinion delivered by Mr. Justice Clarke, this Court held as follows:

> It is, of course, familiar law that the right of removal being statutory, a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress. *Gold Washing, et., Co. v. Keyes*, 96 U.S. 199, 24 L. Ed. 656; Jud. Code, c. 3, §§ 28, 39.

Purely statutory creations of removal and remand (which were unknown at common law) are procedural, not substantive, rights and proceedings, and thus are subject to the established rule that there is no vested constitutional right to a mode of procedure. *See, e.g., Doleac v. Michalson*, 264 F.3d 470 (5th Cir. 2001):

> Furthermore, the Fifth Amendment confers no due process right to appellate review in a federal forum. The remand order affects only the procedural question as to the forum in which Dr. Michalson will seek to defend his interests, and "[n]o one has a vested right in any given mode of procedure". *Crane v. Hahlo*, 258 U.S. 142, 147, 42 S.Ct. 214, 66 L.Ed. 514 (1922); see *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a

> substantive interest to which the individual has a legitimate claim of entitlement."). There is no due process right to appellate review even in circumstances in which much more is at stake than a litigant's preference for a federal forum: even in criminal cases, appellate review does not constitute "a necessary element of due process of law". *McKane v. Durston*, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894).

Id. at 492-93 (footnote omitted). *See also Ex parte Collett*, 337 U.S. 55, 71 (1949) ("No one has a vested right in any given mode of procedure," citing *Crane v. Hahlo, supra*); *Gwin v. United States,* 184 U.S. 669, 674 (1902) ("But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary.")

V. THE PETITIONERS ERRONEOUSLY ARGUE THAT "THIS COURT HAS SANCTIONED CONGRESS' EXERCISE OF THE EXCEPTIONS POWER ONLY WHERE THE 'CLASSES OF CASES' EITHER (i) WERE DRAWN IN TERMS NEUTRAL WITH RESPECT TO LEGAL CONTENT OR (ii) INVOLVED EXCEPTIONS AS TO REVIEWING ISSUES OF FACT."

The Petition engages in wishful thinking in arguing (at p. 21) "This Court has sanctioned Congress's exercise of the Exceptions Power only where the 'Classes of Cases' either (i) were drawn in terms neutral with respect to legal content or (ii) involved exceptions as to reviewing issues of fact."

That argument ignores the fact that the first Congress did not authorize the Supreme Court to review all judgments entered by lower federal courts. The 1789 Act did not provide for appellate review of federal criminal convictions. The Supreme Court has recognized that the Judiciary Act of 1789, ch. 20, 1 Stat. 73, is "[a] contemporaneous exposition of the constitution, certainly of not less authority than [The Federalist]." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (Marshall, C.J., for the Court); *see also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (Judiciary Act of 1789 "was passed by the first congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning"); *Ames v. Kansas*, 111 U.S. 449, 463-464, 469 (1884); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Subsequent Congresses over the next century restricted or alternately expanded the Supreme Court's appellate jurisdiction, *but until Congress granted appellate review of issues of law, there was no provision for appeal on such issues*. In 1802, the Supreme Court was given jurisdiction in federal criminal cases where the judges of the circuit court were divided on a question of law. Act of Apr. 29, 1802, ch. 31, 6, 2 Stat. 159-161. An 1889 statute permitted the Court to exercise appellate review in federal capital cases. Act of Feb. 6, 1889, ch. 113, 6, 25 Stat. 656. The Court's appellate jurisdiction was further extended in 1891 to include "cases of conviction of a capital or otherwise infamous crime." Act of Mar. 3, 1891 (Evarts Act), ch. 517, 5, 26 Stat. 827. The Evarts Act also authorized the Court to review, by appeal or writ of error, the decision of a district or circuit court in "any case that involves the construction or application of the Constitution of the

United States"; "any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question"; and "any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." 5, 26 Stat. 828. In 1914, the Supreme Court was given appellate jurisdiction over state court decisions upholding a federal claim. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

More recently, Congress has conferred on the Court broad discretion to review or decline to review decisions of the federal courts of appeals, and decisions by a state court of last resort on issues of federal law. *See* 28 U.S.C. §§ 1254, 1257. History demonstrates that Congress has never thought that the Constitution itself mandates appellate jurisdiction over all lower court decisions resting on federal law. *See* the Supreme Court 1995 Term, *Congressional Power to Restrict The Supreme Court's Appellate Jurisdiction*, 110 Harv. L. Rev. 277, 283 (1996) commenting that ("John Marshall reported to the Virginia [constitutional] ratifying convention the expectations of the Framers regarding the Exceptions Clause, declaring that 'Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.' ").

Petitioners' attempt to distinguish cases supporting Congressional authority to limit Supreme Court appellate jurisdiction by characterizing them as relating to review of fact issues will not stand analysis. There is no such limitation in the Exceptions Clause. The issue here is the Court's *appellate* jurisdiction, under *Section 2* of Art. III, not this Court's *original* jurisdiction under Section 1. The

Exceptions Clause of Section 2 expressly grants Congress the right to remove from the Supreme Court's *appellate* jurisdiction "both as to law and fact" of the right to review a lower federal court's decisions. The Exceptions Clause does *not* say, "Congress can only create an exception if the lower court decision turned solely on issues of fact." The phrase in Section 2 of Art. III, "with such exceptions . . . as the Congress shall make," modifies the entire jurisdictional statement, "appellate jurisdiction, both as to law and fact," and not just half of it (were it otherwise, then which half?). Such a reading is consistent with Hamilton's explanation in *Federalist No. 81*, as well as this Court's statement in *Luckenbach S.S. Co., Inc. v. United States*, 272 U.S. 533, 536-37 (1926), where, after pointing out that "appellate review is not essential to due process of law, but is a matter of grace," this Court stated, quoting from *The Francis Wright,* 105 U.S. 381, 386 (1882),

> 'Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but *particular classes of questions may be subjected to re-examination and review, while others are not.* To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, *than that neither issues of law nor fact shall be retried* in cases where the value of the matter in dispute is less than $5,000. *The general power to regulate implies power to regulate in all things. The whole of a civil law appeal may be given, or a part.* The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is matter

> of legislative discretion, not of constitutional right.'

Id. (emphasis added).

VI. PRIOR DECISIONS OF THIS COURT MAKE IT CLEAR THAT CONGRESS HAS BROAD DISCRETION TO ENACT STATUTES WHICH EXPAND, LIMIT, OR REGULATE THIS COURT'S APPELLATE JURISDICTION. THE "EXCEPTIONS" CLAUSE DOES NOT BAR CONGRESS FROM ENACTING STATUTES WHICH LIMIT OR BAR REVIEW BY APPEAL OR CERTIORARI OF A DISTRICT COURT'S DETERMINATION WITH RESPECT TO WHICH COURT – STATE OR FEDERAL – WILL HEAR THE MERITS OF THE CLAIMS IN THE FIRST INSTANCE.

As Respondents and the United States as Intervenor argued below, the Supreme Court has consistently recognized that Congress enjoys broad discretion to limit, regulate, and devise exceptions to the Court's appellate jurisdiction. *See, e.g., United States v. More*, 7 U.S. (3 Cranch) 159, 173 (Feb. Term 1805) (Marshall, C.J., for the Court) (Supreme Court's jurisdiction "has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described. * * * This court, therefore, will only review those judgments of the circuit court of Columbia, a power to re-examine which, is expressly given by law."); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (Feb. Term 1810) (Marshall, C. J., for the Court) ("The appellate powers of this court are not given by the judicial act. They are

given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject."); *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (Jan. Term 1847) ("By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress"); *Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1866) ("[I]t is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation."); *St. Louis I.M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 292 (1908) ("Congress has regulated and limited the appellate jurisdiction of this court over the state courts * * * , and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power."); *Yakus v. United States*, 321 U.S. 414, 472-473 (1944) (Rutledge, J., dissenting) ("Congress has plenary power to confer or withhold appellate jurisdiction"); *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) ("Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is sub judice."); *Flast v. Cohen*, 392 U.S. 83, 109 (1968) (Douglas, J., concurring) ("Congress may largely fashion [our appellate jurisdiction] as Congress desires by reason of the express provisions of Section 2, Art. III.").

Felker v. Turpin, 518 U.S. 651 (1996) does not require a different result here. No constitutionally-protected writ of *habeas corpus* is here involved, and, as shown in Section II of this brief *supra*, 28 U.S.C. § 1334(d) does not foreclose

a number of alternative methods of review in appropriate circumstances. *Felker* reaffirms the general principles found in the cases above cited.

VII. THIS COURT'S PRIOR DECISIONS IN *MANGUS v. MILLER*, 317 U.S. 178 (1942) AND *THOMPSON v. MAGNOLIA PETROLEUM CO.*, 309 U.S. 478 (1940) ARE WHOLLY IRRELEVANT, AND DO NOT SUPPORT OR WARRANT THE ISSUANCE OF A WRIT OF *CERTIORARI* IN THIS CASE.

At p. 14 and at pp. 25-26 of the Petition, Petitioners argue that this Court's issuance of writs of *certiorari* in *Mangus v. Miller*, 317 U.S. 178 (1942) and *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940) demonstrate that this Court has granted *certiorari* to consider the propriety *vel non* of abstention in the context of bankruptcy-related litigation.

Neither of those cases involved abstention in the context of bankruptcy-related cases. Neither of those cases involved a district court's decision to abstain from exercising federal jurisdiction in any context, especially a context of statutory vesting of discretion in the district court. Neither of those cases involved the statutes (28 U.S.C. §§ 1334(d) and 1452(b)) challenged by Petitioners. Neither of those cases involved the question whether appellate review by appeal or petition for a writ could be restricted by an act of Congress. Neither of those cases involved an evaluation of the strong Congressional policy underlying legislatively-imposed bars on appellate review under statutes such as 28 U.S.C. §§ 1334(d), 1447(d) and 1452(b).

VIII. THE PETITION ERRONEOUSLY APPLIES NON-STATUTORY ABSTENTION CASELAW TO § 1334(c)(1) ABSTENTION.

At pp. 13 and 25-27, as they did in the Court of Appeals below, Petitioners seek to substitute judicially-created abstention doctrines, particularly that enunciated in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), for the statute that applies in this statutory-abstention case.

Congress set out the following *statutory bases* for statutory abstention: (1) "any equitable ground"; (2) "interest of justice"; (3) "interest of comity"; and (4) "respect for State law." 28 U.S.C. §§ 1334(c)(1), 1452(b). Those statutory factors do not show up in any consideration or discussion in *Quackenbush, Colorado River* [*Colorado River Water Conservation Dist. v. United State*s, 424 U.S. 800 (1976)] or other judicial-doctrine abstention cases relied upon by Petitioners, because none of such decisions involved an abstention based on such statutes. But those statutory factors provide the exact express authority that the District Court needed for its abstention here, and the District Court followed the statutory guidance to the letter. The District Court did not stray from those statutory factors into any other basis for abstention, as occurred in *Quackenbush* and *Thermtron, supra.*

Thus, it is not surprising that the Court of Appeals in this case did not apply *Quackenbush* (heavily relied upon by Petitioners) to this case, nor that the other Courts of Appeals which have addressed the issue have also consistently held that *Quackenbush* and other judicial-doctrine abstention cases do not supply the measure of abstention under 28 U.S.C. §§ 1334(c)(1) or 1452(b). *See, e.g., In re Cathedral of the Incarnation*, 99 F.3d 66, 68-69 (2d Cir.

1996) (*Quackenbush* does not apply to § 1452(b) abstention); *In re United States Brass Corp.*, 110 F.3d 1261, 1265-66 (7th Cir. 1997) (same); *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263, 268 (3d Cir. 2002) (same, also finding that § 1334(c)(1) grounds will constitute equitable grounds under § 1452(b)); *cf. Ariail Drug Co., Inc. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 933-35 (11th Cir. 1997) (noting *Quackenbush* but not applying it where district court remanded under both § 1334 and § 1452).

IX. THE PETITION SHOULD BE DENIED BECAUSE THIS CASE, IN THE STATE COURT SYSTEM FOR THE PAST FOURTEEN MONTHS, HAS BEEN GOING STEADILY FORWARD TOWARD TRIAL.

When this case was remanded to the Circuit Court of Montgomery County, Alabama by the District Court's September 24, 2002 order, neither the Petitioners nor any other party sought a stay of this case pending the appeal to the Eleventh Circuit. Thus, throughout the pendency of the Eleventh Circuit consideration of Petitioners' appeal, and proceedings initiated by them in this Court, the parties have been actively litigating the merits of the case, including conducting discovery and waging several interlocutory appeals and mandamus proceedings in the Alabama Supreme Court, on a separate track from these federal proceedings. *See, e.g., Ex parte Ebbers and Ex parte Salomon Smith Barney, Inc. et al. (In re Retirement Systems of Alabama et al. v. J. P. Morgan Chase & Co. et al.)*, Nos. 1020931, 1021008, 2003 WL 21570770 (Ala. July 11, 2003) (affirming trial court's denial of stay for the Investment Bank Defendants). Respondents respectfully

submit that it would be unjust and cause a substantial delay and disruption, for this case now to swing back to an entirely different court system, assuming that this Court was otherwise willing to consider entertaining an exploration of the constitutionality of 28 U.S.C. §§ 1334(d) and 1452(b). Would this Court hold such provisions unconstitutional on their face, or merely as applied? Would the result be a *de facto* re-removal to the district court (where the Petitioners would undoubtedly move under 28 U.S.C. § 1407 for a transfer of this case to New York where the MDL proceeding is pending)? Would this Court order a remand to the district court to make further findings or evaluations? Respondents believe that addressing alleged constitutional issues in this case is unwise, causes a host of problems that simply do not need to be created or determined, and would contravene the principle that constitutional issues should not be reached in advance of the necessity of deciding them. *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99 (1981); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988).

CONCLUSION

This case presents no precedent-setting or precedent-shattering situation, nor any bar of the exercise of original jurisdiction of this Court, nor any threat to this Court's powers under the Supremacy Clause. This case merely involves a district court's exercise of equitable discretion as permitted by statute, in an interlocutory ruling, to refrain from exercising jurisdiction to try a case based primarily on state law that had initially been properly

filed in state court; and any judgment in the state court will be subject to various modes of review, perhaps even review by certiorari in this Court. This proceeding in fact illustrates the wisdom of Congressional policy, cited *supra*, disapproving of tactical forum maneuvering that proliferates interlocutory decisions bouncing cases between state and federal trial courts, taxing the resources of the judiciary and the parties. For the reasons stated above, Respondents respectfully submit that the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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